U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted] Public Copy

File: SRC-97-241-51063 Office: Texas Service Center Date: JAN 11 2000

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(L)

IN BEHALF OF PETITIONER: [redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is engaged in the wholesale of opto electronic products. It seeks to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner had not established that a qualifying relationship exists between the U.S. and foreign entities, that the U.S. and foreign entities had been doing business, or that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel submits a brief in rebuttal to the director's findings.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization.

The United States petitioner was established in 1995 and states that it is an affiliate of [redacted] located in [redacted] The petitioner seeks to employ the beneficiary for an undetermined length of time at an undetermined salary.

At issue is whether a qualifying relationship exists between the U.S. and foreign entities.

8 C.F.R. 214.2(l)(1)(ii)(G) states:

> Qualifying organization means a United States or foreign firm, corporation, or other legal entity which:
>
> (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
>
> (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

8 C.F.R. 214.2(l)(1)(ii)(L) states, in pertinent part:

> Affiliate means (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
>
> (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

In his decision, the director noted that on the U.S. entity's corporate tax return, the petitioner indicated that it was not a subsidiary in an affiliated group or parent-subsidiary controlled group.

On appeal, counsel states in part that:

> The following evidence was submitted to demonstrate the existence of an affiliate relationship. This evidence clearly demonstrates the required relationships:
>
> A. Copies of Articles of Incorporation of the foreign entity demonstrating that [the beneficiary] was the owner of 99% of the shares of the foreign entity...
>
> B. Copies of the Articles of Incorporation and stock certificate of the U.S. entity demonstrating that [the beneficiary] was the owner of 100% of the shares of the U.S. corporation...
>
> The following evidence is submitted as Attachment 3: A letter from [redacted] a Certified Public Accountant, who prepared the income tax returns of the U.S. corporation. In this letter, Mr. [redacted] states that the U.S. and foreign corporations are not subsidiaries within the definition of the Internal Revenue Code, but are affiliates within the definition as set forth in 8 CFR 214.2(l).

The articles of incorporation for the U.S. entity indicate that it is authorized to issue 500 shares. Share certificate #1 reflects that the beneficiary is the owner of 500 shares of [redacted]

The articles of incorporation for the foreign entity indicate that it is authorized to issue 150,000 shares, and that the beneficiary is the owner of 148,500 of the total shares.

In a letter dated May 5, 1998, the U.S. entity's CPA stated in part:

> These returns indicated a "no" answer to Question 10 on Schedule K - "Did one foreign person at any time during the tax year own, directly or indirectly, at 25% of the classes of stock?" These questions should have been answered with a "yes." I apologize for any confusion that this may have caused.
>
> I have been provided by [redacted] attorney for AGC, the definition of "subsidiary" and "affiliate" as provided in the INS regulations. Under the US Internal Revenue Code, the definition of "subsidiary" is different than the definition set forth in the INS regulations. As defined in the IRS Code, AGC is not a subsidiary because it is not connected through a chain of ownership with a common parent corporation. Under the INS regulation, however, it appears that AGC would be defined as an affiliate organization.

The record does not demonstrate that a qualifying relationship exists between the petitioning entity and the foreign organization. The record indicates that the petitioning entity is 100 per cent owned by the beneficiary. The record further indicates that the foreign entity is majority owned by the beneficiary, but jointly controlled by the beneficiary and his partner, [redacted]. It is noted that the record contains an undated document originating from the foreign entity and signed by "Mrs. [redacted]" As such, the record as presently constituted does not demonstrate that the U.S. and foreign entities are owned and controlled by the same parent or individual, or that the two companies are owned and controlled by the same group of individuals, each owning and controlling approximately the same share or proportion of each entity. As the evidence provided does not demonstrate that the U.S. entity and the foreign organization share common ownership and control, it can only be concluded that a qualifying relationship has not been shown to exist between the petitioning and foreign organizations. For this reason, the petition may not be approved.

Another issue in this proceeding is whether the U.S. and foreign entities are doing business.

Title 8 C.F.R. 214.2(l)(1)(ii)(H) states:

> *Doing business* means the regular, systematic, and continuous provision of goods and/or services by a

> qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

In his decision, the director noted that the only evidence submitted for the foreign entity consisted of business invoices covering August through September 1997. The director further noted that the U.S. entity's lease was month to month only, thereby bringing into question the U.S. entity's long term business scope.

On appeal, counsel states in part that:

> ...Petitioner submitted invoices for August and September...demonstrating business being conducted in the United States in excess of $2,500,000.00.
>
> In support of the decision, there is a comment noting that the month to month lease "brings into questions the long term business scope of [redacted]" This comment comes from the original month-to-month lease of the premises...However the decision fails to consider that the lease has been in existence for five (5) years, and that the parties had executed an Extension through June 30, 1999...Furthermore, income tax returns for 1995 and 1996 were also submitted, showing considerable business activity and conclusively demonstrating the long term business scope of the company.

The record contains evidence such as invoices and tax documentation indicating that the U.S. entity is doing business. However, the petitioner has not persuasively demonstrated that the foreign entity is doing business. The record contains only four invoices for the foreign company. Further, the monetary amounts on the invoices, 1997 tax document, and balance statement all relating to the foreign entity were not converted into U.S. currency rates. As such, it cannot be determined that the foreign entity is engaged in the regular, systematic, and continuous provision of goods and/or services. For this additional reason, the petition may not be approved.

Another issue in this proceeding is whether the beneficiary will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

> "Managerial capacity" means an assignment within an organization in which the employee primarily-

> i. manages the organization, or a department, subdivision, function, or component of the organization;
>
> ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
>
> iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

> "Executive capacity" means an assignment within an organization in which the employee primarily-
>
> i. directs the management of the organization or a major component or function of the organization;
>
> ii. establishes the goals and policies of the organization, component, or function;
>
> iii. exercises wide latitude in discretionary decision-making; and
>
> iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In his decision, the director noted that due to the U.S. entity's limited number of employees, the record was not persuasive that the

beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel states in part that:

> Beneficiary is coming to the United States to expand and grow the organization. He holds the position of president. As president, the Beneficiary will manage the entire organization with all of the duties specified in the definition...A prudent manager or executive does not hire a full complement of employees in a new business until the business is sufficiently established to support such action. Beneficiary has spent five years developing and growing the business in the United States through short business trips. He is now in a position to take the next step in its development, but will be unable to do so unless he is assured that he can be present to manage and control the operations and directions of the business.
>
> The decision questioned whether the organization could support a managerial or executive employee. In expressing some doubt regarding this issue, the decision completely neglected the fact that the 1996 financial documents clearly indicated a cash surplus in excess of $400,000.00...

The record indicates that the U.S. organization was incorporated on January 31, 1995, and the present petition was filed on August 27, 1997. The record further indicates that the U.S. organization has been in operation for more than one year (with a gross annual income of $2 million), and therefore does not qualify as a "new office." Therefore, the initial "start-up phase" associated with new offices, a period in which the beneficiary may be involved primarily in performing nonqualifying duties, does not pertain in the present case. The petitioner was obligated to demonstrate that, as of the filing date of the petition, the beneficiary would be employed in a primarily managerial or executive capacity. Although Part 5 of the petition regarding the "current number of employees" has been left blank, it appears that the beneficiary will be the U.S. entity's only employee. Counsel asserts that the U.S. company contracts for receptionist and secretarial service to staff the office however, the record contains no evidence of such.

The record as presently constituted does not demonstrate that the beneficiary will function at a senior level within an organizational hierarchy other than in position title. The record as presently constituted does not demonstrate that the beneficiary will supervise a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing nonqualifying duties. The record contains no comprehensive

description of the beneficiary's duties that persuasively demonstrates that the beneficiary will be performing in a primarily managerial or executive capacity. The record contains no comprehensive description of the beneficiary's duties that demonstrates that the beneficiary will be managing or directing the management of a department, subdivision, function, or component of the petitioning organization. For this reason, the petition may not be approved.

Beyond the decision of the director, the record contains insufficient evidence to demonstrate that the beneficiary has been employed abroad in a primarily managerial or executive capacity. As this matter will be dismissed on the grounds discussed, this issue need not be examined further.

In visa petition proceedings, the burden of proof remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.